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04/07/03 09:54 AM

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Subject: to OMB: \* 8-hr O3 NAAQS implementation proposal--Revised language on anti-backsliding and transition from 1-hr to 8-hr std.

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03/19/03 09:50 AM

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Subject: \* 8-hr O3 NAAQS implementation proposal--Revised language on anti-backsliding and transition from 1-hr to 8-hr std.

I am attaching the revised language, and also an outline of the section.



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draft 3/19/03

**8-HR O3 NAAQS IMPLEMENTATION PROPOSAL  
REVISED ANTI-BACKSLIDING/TRANSITION SECTION**

OUTLINE

C. How will EPA implement the transition from the 1-hour to the 8-hour standard in a way to ensure continued momentum in States' efforts toward cleaner air?

1. Background
  - a. Background on EPA's current regulation for governing the transition
  - b. Background on the CAA's Anti-Backsliding Provisions.
2. What obligations should continue to apply as an area begins to implement the 8-hour ozone NAAQS and what obligations should no longer apply?
  - a. What obligations should continue to apply for an area that is designated nonattainment for the 8-hour NAAQS and that was designated nonattainment for the 1-hour ozone NAAQS on or after November 15, 1990?
    - (i) Control measures.
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  - b. What obligations continue to apply for areas that are designated attainment under the 8-hour standard and that were designated nonattainment for the 1-hour standard on or after November 15, 1990?
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3. Does the requirement for continued implementation of the obligations addressed above expire at some point?
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  - a. Proposed Options.
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- b. Request for Comment.
  - c. Other Possible Approaches for the Transition from the 1-Hour to the 8-Hour Standard.
5. How will EPA ensure that the public knows which areas must continue provisions under the 1-hour SIPs if EPA revokes the 1-hour standard?

draft 3/19/03

**8-HR 03 NAAQS IMPLEMENTATION PROPOSAL  
REVISED ANTI-BACKSLIDING/TRANSITION SECTION**

C. How will EPA implement the transition from the 1-hour to the 8-hour standard in a way to ensure continued momentum in States' efforts toward cleaner air?

As areas are designated for the 8-hour ozone NAAQS, EPA must address how those areas will transition from current implementation of the 1-hour standard to implementation of the 8-hour standard. In addressing this issue, EPA considered a number of factors, including the existing "anti-backsliding" provisions of the Clean Air Act, Congress' intent, as evidenced in the statute, to ensure continued progress toward attainment of the ozone standard, and the Supreme Court's interpretation of the Clean Air Act and Congressional intent. In subsection 1 of this section, we provide background information on the transition process we set forth in 1997 (and subsequently amended through regulation) and we summarize the statutory anti-backsliding provisions and the Congressional intent in enacting these provisions and subpart 2 of the CAA. In subsection 2, EPA indicates - in light of the CAA provisions and Congressional intent - which requirements that applied for purposes of the 1-hour standard should continue to apply to areas after they are designated for the 8-hour standard. Next, in subsection 3, we consider whether there is a point at which the states should no longer be required to continue to implement those obligations EPA determines continue to apply after areas are designated for the 8-hour standard. In subsection 4, EPA identifies two proposed options to effect the transition from implementation of the 1-hour standard to the 8-hour standard that concern the revocation of the 1-hour standard in whole or revocation of the 1-hour standard in part. Finally, in subsection 5, EPA indicates how it will ensure through regulation that the public knows which "1-hour" obligations remain in place and for which areas.

1. Background

a. Background on EPA's current regulation for governing the transition

At the time EPA promulgated the 8-hour ozone NAAQS in July 1997, EPA issued a rule (40 CFR 50.9(b)) providing that the 1-hour standard would no longer apply to an area once EPA determined that the area had attained the 1-hour NAAQS. 62 FR 38856 (July 18, 1997). This process became known as "revocation" of the 1-hour NAAQS. The EPA interpreted that provision to mean that once the 1-hour standard was revoked, the area's 1-hour

ozone designation no longer applied. Due to the ongoing litigation concerning the 8-hour ozone NAAQS and EPA's implementation strategy for that standard, EPA subsequently modified 40 CFR section 50.9(b) in part to provide that "after the 8-hour standard has become fully enforceable under part D of title I of the CAA and subject to no further legal challenge, the 1-hour standards set forth in this section will no longer apply to an area once EPA determines that the area has air quality meeting the 1-hour standard." See 65 FR 45181 (July 20, 2000).<sup>1</sup> Thus, currently, three criteria would need to be met before EPA could revoke the 1-hour standard for an area: (1) the 8-hour standard would need to be fully enforceable, (2) all legal challenges to the 8-hour ozone NAAQS would need to be resolved; and (3) EPA would need to determine that an area had attained the 1-hour standard.

In this section, EPA is proposing to revise 40 CFR section 50.9(b) to reflect more appropriately the implementation strategy that EPA develops pursuant to this proposal. At the time that EPA initially promulgated 40 CFR section 50.9(b), EPA contemplated that areas would not be subject to the planning obligations of subpart 2 for purposes of implementing the revised 8-hour ozone NAAQS. Furthermore, EPA stated that "as a matter of law," areas should continue to be subject to the planning obligations of subpart 2 for purposes of implementing the 1-hour standard until such time as they attained the 1-hour ozone NAAQS. Thus, EPA contemplated that the 1-hour NAAQS--and the associated designation and classification under subpart 2 for an area, including any mandated control obligations--would continue to apply until the area attained that standard. At that time, the area would be subject only to the planning obligations of subpart 1. In light of the Supreme Court's ruling that EPA cannot ignore subpart 2 for purposes of implementing a revised ozone NAAQS, EPA believes it is appropriate to reconsider how to transition from the 1-hour NAAQS to the 8-hour NAAQS in light of the statutory structure of the CAA, as amended in 1990.

The EPA's principal objectives for the mechanism that would ensure a smooth transition to implementation of the 8-hour standard are to ensure (1) that there will be no degradation of air quality, (2) that areas continue to make progress toward ozone attainment, and (3) consistency with the intent of Congress

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<sup>1</sup>On December 27, 2002 (67 FR 79460), EPA proposed to stay the applicability of its authority to revoke the 1-hour standard pending rulemaking to consider whether to modify the approach for transitioning to the 8-hour standard.

when it originally established the implementation structure for ozone in subpart 2 of the CAA.

We believe the several alternative approaches proposed below are more consistent with the implementation path EPA is proposing in light of the Supreme Court's remand. These alternatives would more effectively continue the momentum towards cleaner air than would have been accomplished under the current 40 CFR 50.9(b) structure while allowing 8-hour ozone nonattainment areas to more readily focus on their 8-hour ozone standard SIP obligations.

b. Background on the CAA's Anti-Backsliding Provisions. The CAA contains a number of provisions that indicate that Congress did not intend to allow States to alter or remove provisions from implementation plans if the plan revision would jeopardize the air quality protection provided in the approved plan. Section 110(l) provides that EPA may not approve a SIP revision if it interferes with any applicable requirement concerning attainment and ROP or any other applicable requirement of the CAA. Congress created a tougher test for areas that might want to relax control requirements that were in SIPs prior to the CAA Amendments of 1990. Section 193 of the CAA prohibits modification of a control requirement in effect or required to be adopted as of November 15, 1990 (i.e., enactment of the 1990 CAA Amendments), unless such a modification would ensure equivalent or greater emissions reductions.

The EPA also believes that Congress set an additional statutory bar for 1-hour ozone areas that were designated nonattainment and classified at the time of the 1990 CAA Amendments. For these areas, Congress classified the areas "as a matter of law" and provided that even upon redesignation to attainment, such areas could not remove from the SIP control measures specified in subpart 2 ("applicable requirements"), but could shift them to contingency measures that would be implemented to "promptly correct any violation of the standard."

For these reasons, EPA believes that although Congress gave EPA the power to revise the existing ozone standard, Congress did not open the door for States to remove SIP-approved measures or to avoid control obligations with which they have not yet complied.

One other provision, though not directly applicable, sheds light on Congress' intent. In 1990, Congress enacted section 172(e), which applies when EPA revises a NAAQS and makes it less stringent. This provision specifies that in those circumstances, States cannot relax control obligations that apply in

nonattainment area SIPs or avoid adopting those that they have not yet adopted.<sup>2</sup> Because Congress specifically mandated that such control measures need to be adopted or retained even when EPA relaxes a standard, EPA believes that Congress did not intend to permit States to remove control measures when EPA revises a standard to make it more stringent, as in the case of the 8-hour standard.

The EPA also notes that in finding EPA's subpart 1-only implementation approach unlawful, the Supreme Court voiced concern that EPA not render subpart 2 "abruptly obsolete" because "Subpart 2 obviously was enacted to govern implementation for some time. ... A plan reaching so far into the future was not enacted to be abandoned the next time EPA reviewed the ozone standard - which Congress knew could happen at any time, since technical staff papers already had been completed in 1989." In response to the decision, EPA is now proposing (as noted above in the discussion on classifications) to use subpart 2 in implementing the 8-hour standard. However, the classification systems EPA is proposing today would result in the majority of ozone nonattainment areas that are currently classified for the 1-hour standard being placed in a lower classification for the 8-hour standard. The EPA's proposed anti-backsliding approaches, discussed below, avoid rendering obsolete the congressionally-specified control measure requirements of subpart 2 for 1-hour ozone nonattainment areas at a time when those areas have not yet met either of the health-based ozone standards.

2. What obligations should continue to apply as an area begins to implement the 8-hour ozone NAAQS and what obligations should no longer apply?

In this section, we consider what obligations from subpart 2 relative to the 1-hour ozone standard should continue to apply to areas after they have been designated for the 8-hour standard. We are proposing that the continuity of particular obligations should vary depending on the attainment status of an area for both the 1-hour and 8-hour standard. We first discuss those obligations that we propose should continue to apply to an area that is designated nonattainment for the 8-hour NAAQS, and that was designated nonattainment for the 1-hour ozone standard on or after November 15, 1990. Second, we discuss those obligations

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<sup>2</sup> Specifically, section 172(e) requires EPA to promulgate regulations providing for controls that "are not less stringent than the controls applicable to areas designated nonattainment" before relaxation of the standard.

that should continue to apply to an area that is designated attainment for the 8-hour NAAQS, and that was designated nonattainment for the 1-hour standard on or after November 15, 1990. (This section addresses only the continued application of requirements that applied by virtue of an area having been designated nonattainment for the 1-hour standard at some point following enactment of the CAA Amendments of 1990. It does not address areas that have been designated attainment for the 1-hour standard at all times since November 15, 1990, because they would not have any continuing obligations under subpart 2 for purposes of the 1-hour standard.) Finally, we address States' continued obligations with respect to the NO<sub>x</sub> SIP Call. We address this issue separately since this obligation applies statewide and without respect to the designation status of areas within the state.

In general, the types of obligations that apply to areas by virtue of their 1-hour classification can be broken into three groups: control obligations; measures to address growth in new sources; and planning obligations. Control measures include specific emission reduction obligations such as NO<sub>x</sub> RACT, I/M, and fuel programs, which are mandated in subpart 2. Measures to address growth are new source review (required under subpart 1 and subpart 2) and conformity (required by subpart 1). Planning obligations consist of attainment and maintenance demonstrations and reasonable further progress plans. For purposes of clarifying what we are proposing with respect to control measures, we also discuss in this section "discretionary" control measures that are not specified in subpart 2. Generally, these are control measures or other obligations the state selected and adopted into the SIP for purposes of attainment, ROP or any other goal to benefit air quality, but which are not specifically mandated by subpart 2.

a. What obligations should continue to apply for an area that is designated nonattainment for the 8-hour NAAQS and that was designated nonattainment for the 1-hour ozone NAAQS on or after November 15, 1990? We believe that Congress intended each area that was classified for the 1-hour ozone NAAQS under subpart 2 to adopt the specified control obligations in subpart 2 for the area's 1-hour classification. The EPA interprets the mandated obligations in subpart 2 for purposes of an area's 1-hour ozone classification to remain applicable to such areas by virtue of the area's classification "as a matter of law" in 1990. (Appendix B of this proposed rulemaking contains a list of the subpart 2 requirements that remain applicable.) The three types of obligations described above (control obligations, measures to



address growth in new sources, and planning obligations) are discussed separately below.

(i) Control measures. EPA is proposing that all areas designated nonattainment for the 8-hour ozone NAAQS remain subject to control measures that applied by virtue of the area's classification for the 1-hour standard. To the extent the area has met the obligation and the control measure is a part of the approved SIP, the State could not modify or remove that measure except to the extent that it could modify or remove that measure for purposes of the 1-hour standard and subject to a demonstration under section 110(l) that modification or removal would not interfere with attainment or maintenance of the 8-hour ozone NAAQS.<sup>3</sup> For control measures that the State has not yet adopted, the State remains obligated to adopt and submit such controls. And, once adopted into the approved SIP, the State could not modify or remove that measure except to the extent that it could modify or remove that measure for purposes of the 1-hour standard and subject to a demonstration under section 110(l) that modification or removal would not interfere with attainment or maintenance of the 8-hour ozone NAAQS. This obligation would apply only to the part of the 8-hour ozone nonattainment area that was designated nonattainment for the 1-hour ozone NAAQS.

To illustrate what we are proposing, we provide the following example, which will also be used in the next section discussing discretionary control measures. Assume an area is classified as marginal for the 8-hour ozone NAAQS and was classified as serious for the 1-hour ozone NAAQS at the time of the 8-hour designations. Also assume RACT for a particular source category is considered an 80 percent reduction in uncontrolled emissions of VOCs at all major sources. In its 1-hour SIP, the State chose to require emission reductions of 90 percent and the RACT requirement applied to all major stationary sources, which for a serious area includes all sources that emit greater than 50 tons/year VOCs. After designation for the 8-hour standard, the State wants to modify this RACT requirement to require only 80 percent reduction in emissions and to limit the

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<sup>3</sup> In addition, for a revision to an obligation that was in effect prior to November 15, 1990, section 193 prohibits a SIP revision without a showing that it would result in equivalent or greater emission reductions. For purposes of avoiding repetition, we do not mention section 193 in each of the examples discussed in this section. However, States remain obligated to make the section 193 demonstration for any revision to a requirement that applied prior to November 15, 1990.

requirement to sources that emit 100 tons/year of VOCs. Because the State could not have modified the RACT obligation to apply only to sources emitting 100 tons/year or more of VOCs for purposes of the 1-hour standard, the State could not change the source cut-off from 50 tons/year for purposes of the 8-hour standard. The 50 tons/year major source threshold would continue to be an "applicable requirement" for the part of the area that was designated nonattainment for the 1-hour NAAQS. The State, however, could apply RACT only to sources that emit 100 tons/year or more for any portion of the area that was not a part of the 1-hour serious nonattainment area. While the 80 percent control level would be considered mandatory, the 90 percent control level was not mandated by the Act and thus is considered a "discretionary control measure." We address below how modification of a discretionary control measure would be treated under this proposal.

The same principle would hold true for control measures in a maintenance plan for an area that was designated nonattainment for the 1-hour standard at or after November 15, 1990 and that was subsequently redesignated to attainment under the 1-hour ozone standard.<sup>4</sup> Subpart 2 control measures (including those that had been shifted to contingency measures) could not be removed from the SIP and could be modified only to the extent that they could have been modified if the 1-hour standard remained in effect for the area. If the State had previously shifted a mandated subpart 2 control measure to its contingency plan, EPA would not require that the area begin to implement that measure as part of its 8-hour implementation plan, if the measure was not required under its classification under the 8-hour standard. However, the measure would need to remain as a contingency measure for the area and could not be removed from the SIP.

(ii) Discretionary control measures. Many approved SIPs contain control measures that are not specified under subpart 2 for the area, but that the State chose to adopt as part of the

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<sup>4</sup>A maintenance plan, which is a SIP revision required under sections 107(d)(3)(E) and 175A as a prerequisite for redesignating a nonattainment area to attainment, must provide for maintenance of the NAAQS for 10 years after redesignation and must contain contingency measures to promptly correct any violation of the standard that occurs after redesignation. Contingency measures must provide for implementation of all measures that were contained in the SIP for the area before redesignation of the area as an attainment area.

demonstration of attainment or part of the ROP requirement for the 1-hour NAAQS. For these kinds of measures, EPA is proposing that no additional burden be placed on the State. For purposes of the 1-hour standard, States may currently revise or remove those requirements so long as they make a demonstration consistent with section 110(1) that such removal or modification would not interfere with attainment of or progress toward the 1-hour ozone NAAQS (or any other applicable requirement of the Act). Under the CAA, for purposes of the 8-hour standard, the same obligation would apply except the State would need to make the demonstration with respect to the 8-hour standard instead of the 1-hour standard.

In the example above, if a State wants to revise the control level for certain sources from 90 percent control to 80 percent control, the State may do so because subpart 2 mandated RACT in this example is an 80 percent level of control rather than a 90 percent control level. The 90 percent control level thus was "discretionary." We are proposing that no additional burden, beyond the statutory section 110(1) test, be placed on the state to alter this requirement. Thus, to revise the control level, the state would need to demonstrate, consistent with section 110(1), that the lower control level of 80 percent would not interfere with attainment of the 8-hour standard or reasonable further progress for the 8-hour standard (or any other applicable requirement of the Act).

A number of SIPs contain enforceable commitments to adopt additional discretionary emission reduction control measures in the future. The State remains obligated to these commitments to the same extent as if they were adopted measures. The only way a State may modify or remove such a commitment is through a demonstration under section 110(1).

(iii) Measures to address growth. For 1-hour nonattainment NSR requirements in place at the time an area is designated nonattainment for the 8-hour standard, we are proposing that the major source applicability cut-offs and offset ratios continue to apply to the extent the area has a higher classification for the 1-hour standard than for the 8-hour standard. The EPA sees no rationale under the CAA - given the Congressional intent for areas "classified by operation of law" - why the existing NSR requirements should not remain "applicable requirements" for the portion of the 8-hour nonattainment area that was classified higher for the 1-hour standard. However, if an area has been redesignated to attainment for the 1-hour standard as of the date of designation for the 8-hour standard, and is thus no longer implementing the nonattainment NSR program for its previous 1-

hour ozone classification, it would not need to revert back to program it had for purposes of the 1-hour standard.

For example, if an area is classified moderate under the 8-hour standard, but was classified severe under the 1-hour standard at the time of the 8-hour designations, the portion of the 8-hour nonattainment area that was classified severe for the 1-hour standard would remain subject to an offset ratio of 1.3:1 and a major source threshold of 25 tons/year. The remaining portions of the 8-hour area would be subject to the offset ratio for moderate areas (1.15:1) and the moderate area major source threshold (100 tons/year). If the severe 1-hour area had been redesignated to attainment prior to the time of the 8-hour designations and was subject to PSD rather than NSR, however, the entire designated area for the 8-hour standard would be subject to the offset ratio and major source threshold for a moderate area.

(iv) Planning SIPs. Most areas that are nonattainment under the 1-hour standard have already adopted attainment and ROP plans. However, there are a few areas that remain obligated to submit attainment or ROP SIPs. The EPA proposes how to address ROP elsewhere in this proposed rulemaking and will not repeat those options in detail here. In general, however, EPA is proposing that States are still obligated to address separately ROP that does not overlap with ROP obligations for the 8-hour NAAQS. Where the ROP obligations overlap, the area need not separately address ROP for the 1-hour standard. For ROP already adopted into the SIP, EPA is proposing that the State may remove or revise control measures needed to meet the ROP milestone if such control measures were "discretionary," as discussed above. But, a State could not revise or remove control measures if they would interfere with meeting the ROP goals. In other words, the CAA-mandated ROP emission reduction targets that applied for the 1-hour standard would still have to be met, but discretionary measures adopted to meet those targets could be modified, if the State makes the necessary showing under section 110(1).

With respect to attainment demonstrations, EPA is soliciting comment on the interpretation it should take for the two scenarios we believe exist. The first scenario would be a State that does not have a fully approved attainment demonstration under the 1-hour standard because it has failed to act in a timely manner. The second scenario is an area subject to an obligation to submit an attainment demonstration under the 1-hour standard in the future. In general, since attainment demonstrations are planning SIPs, and States must now be planning to attain the 8-hour NAAQS, one might argue that Congress could

not have intended areas to continue to plan to meet a standard that EPA no longer considers to be adequately protective of public health. This is especially true when to do so would divert resources from planning to meet the 8-hour standard. In contrast, one could argue that allowing areas to bypass planning obligations under the 1-hour standard will delay attainment of health protection since States have more time to submit attainment plans under the 8-hour standard than under the 1-hour standard.<sup>5</sup>

There are some cases where a State does not have a fully-approved attainment demonstration because it has failed to act in a timely manner. To lift that obligation from those areas simply because EPA had adopted a more stringent NAAQS could result in a more preferential treatment of those areas over areas that did adopt fully-approvable attainment demonstrations with the requisite controls. For example, if an area has adopted controls to demonstrate attainment of the 1-hour standard, it may not remove those controls from its SIP without a demonstration that those controls would not interfere with attainment or progress toward the 8-hour standard (or any other applicable requirement of the Act). Such an area likely would have more stringent control obligations in place than the area without a fully-approved attainment SIP and would have a high hurdle to removing or altering those controls. In contrast, the area without a fully-approved attainment demonstration would likely make slower progress toward attaining the 8-hour NAAQS (at least in the short-term) because it does not have all necessary measures in its approved SIP and--without a clear requirement to the contrary--would be under no pressure to have those measures in its SIP until its attainment demonstration for the 8-hour NAAQS is due.

For the following examples of actual situations, EPA is soliciting comment on whether to retain the obligation to develop

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<sup>5</sup>For instance, an area with a past-due obligation to revise its SIP to develop a new attainment demonstration for the 1-hour standard could possibly submit such a revision within the next year or so (2004-2005), with emission reductions beginning to occur likely within 1 or 2 years (by 2006-2007). If this area were now only required to address the 8-hour standard, it would not have to submit a new attainment demonstration until 2007, as proposed elsewhere in this proposed rule, with emission reductions occurring from that demonstration likely a year or more after 2007, which is several years after the time period possible by fulfilling the existing obligation.

a 1-hour attainment demonstration or to determine that the requirement no longer applies. In addition, EPA is soliciting comment on two alternatives that might address some of the inequities, while not subjecting States to the more complicated planning associated with developing two separate attainment demonstrations (one under the 1-hour standard and another under the 8-hour standard). Under the first alternative approach, areas that are subject to an obligation to submit a new or revised attainment demonstration would instead be required to submit a SIP revision that would obtain an advance increment of emission reductions toward attainment of the 8-hour ozone standard within a specified, short-term timeframe. For example, EPA could require these areas to submit within 1 year of promulgation of the implementation rule a plan revision that requires a specific percentage of emission reductions (e.g., 5 percent or 10 percent) from the baseline emissions for the 8-hour NAAQS. In addition, EPA could require that the measures be implemented in the near term, e.g., no more than 2 years after adoption. Under the second alternative, areas with an outstanding obligation to submit a 1-hour attainment demonstration would be required to submit their 8-hour ozone attainment demonstration early in lieu of being required to submit a 1-hour attainment demonstration. Submittal of an early 8-hour attainment demonstration would likely prevent the inequity of areas avoiding emission reductions in the short term, as described in the preceding footnote.

- Example 1: An area has not met in part or in full a past-due obligation to submit a 1-hour attainment demonstration required because EPA reclassified the area to a higher classification after it failed to attain the 1-hour standard by its attainment date.
- Example 2: An area is subject to an obligation to submit an attainment demonstration in the future, as is the case where EPA applied its attainment date extension policy rather than reclassifying an area that failed to meet its attainment date and EPA has subsequently reclassified the area or soon will do so, because of the courts' rejection of the extension policy.

(v) Other Obligations. A number of areas have SIPs that contain commitments to review their progress toward attaining the 1-hour NAAQS (in some cases, these are called "mid-course reviews"). These SIP-approved commitments are enforceable, and EPA and the States can use these mid-course reviews to ensure that progress is being made consistent with the analysis in the area's 1-hour attainment demonstration. The State remains obligated to honor these commitments.

b. What obligations continue to apply for areas that are designated attainment under the 8-hour standard and that were designated nonattainment for the 1-hour standard on or after November 15, 1990?

(i) Obligations Related to NSR. Areas that are attainment for the 8-hour ozone NAAQS would not be subject to nonattainment NSR for the 8-hour standard. We believe it makes little sense to require nonattainment NSR to continue simply because these areas were previously designated nonattainment for the 1-hour standard. Thus, EPA proposes that these areas would be subject to PSD and would not be subject to the nonattainment NSR offset and major source thresholds that applied under their classification for the 1-hour standard.

(ii) Obligations Related to Planning Obligations Other than Maintenance Plans. With respect to SIP planning obligations (ROP plans and attainment demonstrations), we are proposing that the SIP planning requirements that applied for purposes of the 1-hour standard would not continue to apply to these areas as long as they continue to maintain the 8-hour NAAQS. Thus, even if these areas have failed to meet ROP or attainment plan obligations for the 1-hour standard, they would not be required to meet them for so long as they remain in attainment with the 8-hour standard. (As discussed below, however, we are proposing that such areas develop a maintenance plan under section 110(a)(1).) This approach is consistent with EPA's "Clean Data Policy"<sup>6</sup> under the 1-hour standard, which provides for these planning obligations to be stayed once an area attains the standard, but only for so long as an area remains in attainment of the 1-hour standard. If such an area violates the 8-hour NAAQS--prior to having an approved maintenance plan in effect (as proposed below to be required for these areas)--those obligations would once again apply in the same manner that they apply in areas designated nonattainment for the 8-hour ozone NAAQS.

(iii) Obligations Related to Control Measures and Maintenance Plans. The issue of what obligation remains with respect to "non-discretionary" control measures approved into the SIP or required under the Act is more difficult. The EPA's approach for these is based on the Act's requirements for maintenance plans. (Consistent with EPA's proposal for discretionary control

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<sup>6</sup>Memorandum of May 10, 1995, "RFP, Attainment Demonstration, and Related Requirements for Ozone Nonattainment Areas Meeting the Ozone National Ambient Air Quality Standard," from John S. Seitz, Director, Office of Air Quality Planning and Standards. Available at:  
<http://www.epa.gov/ttn/oarpg/t1/memoranda/clean15.pdf>.

measures in areas designated nonattainment for the 8-hour NAAQS, we would permit areas to modify discretionary measures for areas designated attainment for the 8-hour NAAQS so long as section 110(1) is met.)

If EPA determined that these areas<sup>7</sup> were required to develop maintenance plans pursuant to section 175A, then they would need to keep (or to adopt and then keep) those control measures in the SIP, though they could shift them to contingency measures. Some commenters urged EPA to require all areas previously designated nonattainment for the 1-hour NAAQS to retain (where the area had been redesignated to attainment) or develop (where the area was still designated nonattainment for the 1-hour NAAQS at the time of 8-hour designations) a section 175A maintenance plan. However, EPA does not believe that a section 175A maintenance plan is mandated or is necessary for areas initially designated attainment for the 8-hour NAAQS.

Section 175A maintenance plans are required for areas that were designated nonattainment for a NAAQS and then subsequently redesignated to attainment for that NAAQS. The areas addressed in this section have never been designated nonattainment for the 8-hour ozone NAAQS. Moreover, they have a maintenance obligation that already applies: Section 110(a)(1) requires areas to demonstrate how they will attain and maintain a new or revised NAAQS.<sup>8</sup> Therefore, EPA does not believe that Congress mandated that such areas be subject to the section 175A maintenance plan obligation for the 8-hour NAAQS, nor does EPA believe it is necessary to interpret that provision to apply.

For an area that was never redesignated to attainment for the 1-hour standard and never had a section 175A maintenance plan, EPA is proposing that if the area wants to revise any part of its current 1-hour SIP, the area must first adopt and submit a maintenance plan consistent with section 110(a)(1). Moreover, even if the State elects not to revise its existing SIP, EPA is proposing that the area submit a section 110(a)(1) maintenance

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<sup>7</sup>Areas that are designated attainment under the 8-hour standard and that were designated nonattainment for the 1-hour standard on or after November 15, 1990.

<sup>8</sup> Based on ambient ozone data for the period 1998 to 2000 for the hypothetical nonattainment areas, EPA identified approximately 20 areas that are currently designated nonattainment under the 1-hour standard but that will likely be designated attainment under the 8-hour standard).



plan within 3 years of designation as attainment for the 8-hour NAAQS. The EPA believes that the maintenance plan should provide for continued maintenance of the 8-hour standard for 10 years following designation for the 8-hour NAAQS and should include contingency measures. Unlike section 175A, section 110(a)(1) does not address contingency measures and thus does not specify that mandated controls in the existing SIP must be shifted to contingency measures if modified or removed. We are proposing that so long as the State adopts sufficient measures as contingency measures, it can modify or remove control measures in the approved SIP so long as it makes a demonstration consistent with section 110(1).

The EPA is also proposing that areas with approved 1-hour section 175A maintenance plans will be able to modify those maintenance plans consistent with their obligation to have a maintenance plan for the 8-hour NAAQS under section 110(a)(1). For these areas, EPA is proposing that the following obligations could be removed from the SIP so long as the State demonstrates that the area will maintain the 8-hour standard consistent with section 110(a)(1) for a period of 10 years following designation for the 8-hour NAAQS:

- the obligation to submit a maintenance plan for the 1-hour standard 8 years after approval of their initial 1-hour maintenance plan;
- the requirement to implement contingency measures upon a violation of the 1-hour ozone standard; however, such areas would need contingency measures as part of a maintenance SIP for the 8-hour NAAQS and States could elect to modify the existing contingency measure trigger so that it is based on a violation or exceedance of the 8-hour standard.

(iv) Obligations Related to Conformity. For all areas designated attainment for the 8-hour ozone NAAQS, the requirement to demonstrate conformity to the 1-hour standard would no longer apply once the 1-hour standard is revoked in whole or determined not to apply for that purpose under a partial revocation of the 1-hour standard (as proposed below). Under section 176 of the CAA, conformity applies to areas designated nonattainment or subject to the requirement to develop a maintenance plan pursuant to section 175A. Areas designated attainment for the 8-hour standard would no longer be subject to the obligation to demonstrate conformity to the 1-hour emissions budgets in an approved attainment or rate of progress SIP or an approved section 175A maintenance plan for the 1-hour standard. The reason for this is that, under the options proposed below, they

would either no longer be designated nonattainment for the 1-hour standard or the nonattainment designation would no longer apply for purposes of conformity, and the area would no longer be required to develop a maintenance plan under section 175A for purposes of the 1-hour standard.

c. What happens with respect to the NO<sub>x</sub> SIP Call?

Section 110(a)(2)(D) of the CAA establishes requirements for States to address the problem of transport. It requires a SIP to prohibit the State's sources from emitting air pollutants in amounts that will contribute significantly to nonattainment, or interfere with maintenance, in one or more downwind States. As noted above in Section I of this proposal, in 1998, EPA called on 22 States and the District of Columbia ("States") to reduce emissions of NO<sub>x</sub> consistent with budgets set for each State. 63 FR 57356 (October 27, 1998). Furthermore, EPA granted petitions under section 126 and thus directly regulated certain sources of NO<sub>x</sub> emissions in many of the States covered by the NO<sub>x</sub> SIP Call. 65 FR 2674 (January 18, 2000). Below, we refer to these collectively as the "NO<sub>x</sub> transport rules."

The NO<sub>x</sub> transport rules were designed to prevent upwind NO<sub>x</sub> emissions from contributing to nonattainment in a downwind area for both the 1-hour and 8-hour ozone NAAQS. The EPA, however, stayed the 8-hour basis for the NO<sub>x</sub> transport rules in response to the extensive and extended litigation (described above) that occurred concerning the establishment of the 8-hour ozone standard. We intend to take rulemaking action to lift the stay of the 8-hour basis for these rules. We recognize, however, that concerned parties may attempt to challenge the 8-hour basis for the NO<sub>x</sub> transport rules when EPA lifts the stay.

We believe it important to ensure that the transition to the 8-hour standard does not have the effect of jeopardizing the controls required to be in place under the NO<sub>x</sub> transport rules. Regardless of whether EPA lifts the stay of the 8-hour basis for these rules, the controls required have substantial benefits for reductions of both 1-hour and 8-hour ozone levels. We believe that relaxing such controls would be contrary to the principles we identified above for an effective transition. Consequently, we are proposing that States must continue to adhere to the emission budgets established by the NO<sub>x</sub> SIP Call after the 1-hour standard is revoked in whole or in part, as proposed below. Similarly, we are not proposing to revoke or modify its section 126 regulation.

However, as they do now, States retain the authority to

revise the control obligations they have established for specific sources or source categories, so long as they continue to meet their SIP Call budgets. In addition, consistent with section 110(l), the States would need to demonstrate that the modification in control obligations would not interfere with attainment of or progress toward the 8-hour NAAQS or with any other applicable requirement of the Act.

d. What additional obligations under part D of title I of the CAA would not continue to apply after the 1-hour standard is revoked in whole or in part?

As discussed elsewhere in this proposal, we are proposing that areas would not be obligated to continue to demonstrate conformity for the 1-hour standard once the 1-year grace period for application of conformity for the 8-hour standard has elapsed.

In addition, EPA would not take certain actions with respect to the 1-hour ozone NAAQS. First, EPA is proposing that it would no longer make findings of failure to attain the 1-hour standard and, therefore, would not reclassify areas to a higher classification for the 1-hour standard based on a failure to meet the 1-hour standard. The EPA believes that areas should focus their resources on attainment of the 8-hour standard and that it would be counterproductive to establish new obligations for States with respect to the 1-hour standard after they have begun planning for the 8-hour standard. (Moreover, EPA notes that the attainment dates for marginal, moderate and serious areas have passed and the CAA does not provide for reclassification of severe areas in the absence of a request by the State.) The EPA, of course, must ensure that areas are continuing to make progress toward cleaner air. If EPA determines that a State is not adequately implementing an approved SIP and achieving air quality reductions in a timely manner, EPA may enter into an informal process to ensure the State takes any necessary action<sup>9</sup> or, alternatively, may take more formal action such as making a finding of failure to implement the SIP or issuing a SIP Call to require action. As noted above, many areas have SIPs that contain commitments to review their progress toward attaining the 1-hour NAAQS ("mid-course review"). These SIP-approved commitments are enforceable, and EPA and the States can use these

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<sup>9</sup>For instance, upon discussion between EPA and States, some States have in the past voluntarily agreed to revise their SIPs when it appears that the SIP is inadequate to attain or maintain the NAAQS.

mid-course reviews to ensure that progress is being made consistent with the analysis in the area's 1-hour attainment demonstration.

3. Does the requirement for continued implementation of the obligations addressed above expire at some point?

The SIP obligations under the 1-hour standard for an area's classification under the 1-hour standard would not expire after the 1-hour standard is revoked in whole or in part. However, for those mandatory requirements that continue to apply to an area due to the area's classification for the 1-hour NAAQS, EPA is proposing two options for when the State may move the mandatory measures to a maintenance plan in the SIP and treat them as contingency measures:

a. Option 1. When the area achieves the level of the 1-hour ozone standard (even if the area has not yet attained the 8-hour standard). The rationale for this option is that Congress intended an area to continue to implement these obligations until it attained the 1-hour standard, at which time the area would be able to discontinue implementation upon a showing of continued maintenance. However, in such a case, the area could not remove the measures from the SIP; rather, it could shift such measures to contingency measures. While this option facially appears to mirror Congressional intent more closely, it raises issues where an area attains the 8-hour standard but does not have air quality meeting the 1-hour standard.

b. Option 2. When the area attains the 8-hour standard and is designated attainment (regardless of when, if ever, the area attains the 1-hour standard). The rationale for this option is that the 8-hour standard is the standard that EPA has determined will protect public health and the environment. Once an area demonstrates it has met and can maintain the health protective standard, it would be appropriate to remove or modify those controls.

It should be noted that either of these two options could apply for either of the transition options, discussed in section 4, below.

4. When will EPA revoke the 1-hour standard?

The EPA is proposing to revoke the 1-hour standard either in part or in whole 1 year following designations for the 8-hour NAAQS. As discussed below, we are proposing two different legal mechanisms for achieving the revocation. Under either approach,

however, the same stipulations continue to apply to areas currently or formerly designated nonattainment for the 1-hour standard.

The deciding factor supporting the schedule for the revocation in our proposal is to ensure areas do not have to perform conformity analyses for both the 1-hour and 8-hour standards at the same time. As background, areas designated nonattainment for the first time for a new standard (e.g., the 8-hour ozone standard) have a 1-year grace period before conformity applies for that standard (i.e., a 1-year grace period before conformity applies for the 8-hour ozone standard). This 1-year grace period before conformity is required for the 8-hour standard applies to all areas designated nonattainment for the 8-hour standard, regardless of their 1-hour NAAQS designation status. Thus, under either of the mechanisms described below, EPA is proposing that conformity for the 1-hour standard no longer apply 1 year following the effective date of the 8-hour designation (i.e., when the standard is revoked in whole or in part). However, conformity obligations for the 1-hour ozone standard would remain applicable during the grace period and would not be affected by the designation of areas for the 8-hour standard. The EPA's intentions regarding conformity--as well as a more complete discussion of transportation conformity--appears elsewhere in this proposal.

a. Proposed Options.

(i) Option 1: Revocation in whole of the 1-hour standard.

Under this option, which is EPA's preferred option, EPA would revoke the 1-hour standard and the associated designations and classifications 1 year following the effective date of the designations for the 8-hour NAAQS. The complete revocation of the 1-hour standard would occur in late spring of 2005 on the effective date of the 8-hour NAAQS designations, which will be issued by April 15, 2004. In order to address the anti-backsliding issues discussed in section 2, above, EPA would promulgate regulations specifying those requirements that would continue to apply after the revocation of the 1-hour standard. The regulations would also specify the geographic areas in which those obligations continue to apply, since areas designated nonattainment for the 8-hour standard may include counties that were not designated nonattainment for the 1-hour standard. The anti-backsliding regulations would apply only to the portion of the 8-hour nonattainment area that was designated nonattainment for the 1-hour standard.

(ii) Option 2: Partial Revocation of 1-hour Standard. Under this mechanism, EPA would retain the 1-hour standard and its

associated designations and classifications for limited purposes (viz., those discussed and proposed above in section 2) until the area meets the 1-hour standard. For many areas, this is likely to extend well beyond May 2005, the date of likely revocation under Option 1.<sup>10</sup> For all remaining purposes, EPA would revoke the 1-hour standard and the associated designations and classifications 1 year after the effective date of designations for the 8-hour standard. As noted above, EPA believes that Congress initially intended the State's obligations under subpart 2 to continue to apply "as a matter of law," and the 1-hour designations and classifications--established for the circumstances present when the requirements were enacted--are the mechanism Congress identified for triggering the applicability of these requirements. Under this theory, Congress would have intended the standard to remain in place for purposes of control measures and NSR requirements, as discussed above.

While the partial retention of the standard itself and the associated designations and classifications would be the mechanism used to retain the specified obligations, EPA would need to promulgate regulations similar to those described in option 1 to ensure that it is clear for which purposes the standard is being retained.

b. Request for Comment. Both of these options would achieve the same result--ensuring the continued applicability of certain control requirements in subpart 2 and ensuring continued improvement in air quality, while shifting the focus from modeling and other planning requirements for the 1-hour standard to analyses for the 8-hour standard. We solicit comment on which mechanism is preferable for accomplishing the overriding objective of preventing backsliding from statutory and SIP requirements while achieving a smooth transition to implementation of the new standard. In addition, EPA also solicits comment on whether to retain the limit in current 40 CFR section 50.9(b) that the 1-hour standard will not be revoked for any area until the 8-hour standard is no longer subject to legal challenge.

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<sup>10</sup> A number of commenters in the pre-proposal phase recommended an approach premised on retention of the standard. See, e.g., Letter of December 5, 2002 from Michael P. Kenny, Executive Director, California Air Resources Board, to Jeffrey R. Holmstead, EPA Assistant Administrator for Air and Radiation. Available at: <http://www.epa.gov/ttn/naaqs/ozone/ozonetech/o3imp8hr/o3imp8hr.htm>.

c. Other Possible Approaches for the Transition from the 1-Hour to the 8-Hour Standard.

The EPA considered other approaches for the timing of the revocation of the 1-hour ozone standard; these are discussed in a separate document available in the docket.<sup>11</sup>

5. How will EPA ensure that the public knows which areas must continue provisions under the 1-hour SIPs if EPA revokes the 1-hour standard?

The EPA would promulgate regulatory provisions identifying the obligations that areas remain subject to and identifying the areas. If EPA ultimately chooses to revoke the 1-hour standard and the associated designations and classifications shortly after designations for the 8-hour standard (as proposed below), EPA would ensure that there are provisions in the Code of Federal Regulations (CFR) that continue to define the boundaries for those areas. The reason for this is that boundaries for 8-hour ozone nonattainment areas may not be coextensive with those for the 1-hour standard, and EPA would need to make clear which areas or portions of areas must continue to implement obligations due to their 1-hour classification.

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<sup>11</sup>Additional Options Considered for "Proposed Rule to Implement the 8-Hour Ozone National Ambient Air Quality Standard." U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Research Triangle Park, NC. February 2002.